

Chapter 8

Legal and Financial Issues

*The material in this chapter was written and prepared by Timothy M. Vogel, Esq., of Vogel & Associates in Portland, Maine, a law firm specializing in elder law. The material is designed to provide authoritative information regarding the subject matter covered. The material is provided with the understanding that it does **not** constitute individual legal advice. Your specific individual circumstances will dictate the appropriate legal and financial advice for you. If you desire direct legal advice regarding your circumstances, you should directly consult an attorney familiar with this subject matter. If financial advice or other expert assistance is required, the services of a professional should be sought.*

What This Chapter Will Cover

- Who can participate in decision making when the resident's ability to make and carry out decisions declines due to Alzheimer's disease, dementia or other accident or illness.
- The decision-making assistance of an Agent with Power of Attorney, as well as a Probate Court appointment of a Guardian and Conservator.
- The best methods to intervene to direct and control the behavior of the Alzheimer's or dementia-impaired resident within the context of the resident's individual decision-making ability and the legal decision-making authority of the Agent under the Power of Attorney, as well as the Guardian and Conservator.
- Understanding the law to avoid negligent liability.
- Operating your business to protect yourself and your residents.

Advance Directives: Appointing Legal Decision-Makers

Maine law, as well as our society in general, places great importance in individual autonomy and the respect due to each person's ability to make decisions. We respect adults to run their own lives and to make decisions for themselves. It becomes a difficult situation to which we must adjust when a person's decision-making ability declines due

to Alzheimer's disease, another dementia condition, or an accident or illness. All of us should identify in advance the persons we want to assist us if we become incapacitated and they cannot make decisions on our own.

It is best for the resident to voluntarily appoint a trusted individual to be available to assist with making or carrying out decisions if the resident becomes incapacitated. The most appropriate legal documents in this situation are called **Advance Directives**, so called because in *advance* of something happening to a person that individual *directs* who should have authority to assist the person and in what fashion.

The most common Advance Directives are the **Durable Financial Power of Attorney** (DFPOA) and the **Power of Attorney for Health Care** (POAHC), including **Living Will** language that specifies the extent to which medical care is to be provided or withheld during a terminal condition. These documents are sometimes collectively referred to as a **Durable Power of Attorney** (DPOA).

➡ **Everyone should have both a Durable Financial Power of Attorney and a Power Of Attorney For Health Care to help him or her if they become incapacitated and unable to make decisions without assistance.**

Spouses, solely through marriage, have no legal right to make legal, financial or medical decisions for the other spouse, except in the limited circumstances as surrogates under the Maine Uniform Health-Care Decisions Act (UHCDCA). Spouses have no legal right to make financial or property decisions for the other spouse, except for those accounts or property that are held jointly. Physicians and health care institutions may consult and cooperate with the healthy spouse. However, if a difference of opinion develops as to proper medical care for the patient, the physician or health care institution may stress that the spouse has no legal authority to make health care decisions for the patient.

➡ **It is essential to make legally adequate provisions regarding who will have legal and decision-making authority at a time when the older adult is mentally able to grant such authority.**

Important Power of Attorney Terms You Should Know

- The legal document is generally called the DURABLE POWER OF ATTORNEY (DPOA). This applies to both a DURABLE FINANCIAL POWER OF ATTORNEY (DFPOA) and a POWER OF ATTORNEY FOR HEALTH CARE (POAHC).
- The person (resident) signing the document is the PRINCIPAL.
- The Principal appoints the AGENT (also known as ATTORNEY-IN-FACT) to have authority to assist the Principal with making or carrying out decision making. Frequently the Agent is the Principal's trusted spouse, child, relative or close friend.

- The Principal should appoint a primary Agent and a SUCCESSOR AGENT or Agents. This is important in case the primary Agent is unable or unavailable to assist the Principal. It's generally a good idea to list the Successor Agents in order of preference or ability, and to have them serve as Agent if the person listed prior to them becomes unable or unavailable to assist the Principal. Sometimes two or more Agents will be authorized in a DPOA to act at the same time as co-Agents. This runs the risk that one of the Agents may take actions on behalf of the Principal without informing the other Agent. When two or more Agents act as cross-purposes frequently they cause great difficulties.

Conditions Required For a Valid Power of Attorney

- The Principal (resident) must be aware of the matters that concern him or her, such as money, property and medical issues. It is not necessary that the Principal know the exact total in the bank account, but the Principal must know in general the matters involved with his or her life.
- The Principal must be able to select who he or she wants to be primary Agent and successor Agents. Many persons in the early stages of Alzheimer's Disease or another dementia condition have sufficient mental ability to have legal capacity to execute a valid Power of Attorney.
- It is the professional duty of the lawyer to evaluate the person's mental condition and the applicable standard of law to determine if person has the legal capacity to execute the Power of Attorney.

Important Facts About the How Power of Attorney Works

1. The Principal can continue to act for him or herself, and can amend or revoke the DPOA, as long as the principal possesses mental capacity.
2. Both the DFPOA and the POAHC documents can become effective when they signed. Then there will be no question that the Agent has authority to act on behalf of the Principal. However, this approach establishes the Agent with authority to act for the Principal while the Principal continues to act for him or herself. This may be no problem if the Principal trusts and communicates with the Agent. There may be difficulties if the Principal and Agent fail to communicate, or if the Principal becomes paranoid as result of declining mental abilities. As another option, the document can be written to require that written proof of the Principal's incapacity must be produced before anyone may respect the DFPOA or POAHC to be valid. While this may offer the Principal a sense of security, it may prove difficult for the Agent to prove his or her authority to act for the Principal, especially in an emergency.
3. The DPOA should be DURABLE. That is what the "D" in DPOA represents. Durable means that the document remains valid in spite of any future physical or mental disability the principal might suffer. The document is durable when it

contains language stating that the validity of the document is not affected by the subsequent physical disability or mental incapacity of the Principal, or by the expiration of a set amount of time. Frequently, when the document has such language and is thus durable, the document will have the word “Durable” in its title.

4. For the DFPOA, Maine law requires that warning notices must be included in the document for documents signed after September 18, 1997. Such notices have specific language that must be used to notify both the Principal and the Agent of the serious nature of the DFPOA, as well as their rights and responsibilities. The Agent is informed that civil and criminal penalties exist for any financial abuse or mismanagement by the Agent. This warning language requirement does not render ineffective a valid DFPOA that was executed prior to September 18, 1997.
5. The DFPOA covers financial matters and legal decisions. If the Agent is to have authority to manage the Principal’s assets to eventually qualify for Medicaid, specific asset-gifting authority must be included in the DFPOA.
6. The POAHC covers medical and health care decisions, and authorizes the Agent to have access to medical information concerning the Principal. Under Maine law, the POAHC also incorporates medical decisions for patients in a terminal medical condition that had been previously controlled under Maine’s Living Will law. The Principal may include in the POAHC his or her decision that when in a terminal medical condition, he or she does not wish to receive medical treatment or intervention that only prolongs the dying process.
7. In the DFPOA, the Principal can nominate a person, usually the Agent, to be the Guardian or Conservator for the Principal. This nomination is useful in the unlikely event that someone would petition the Probate Court to appoint a Guardian or Conservator for the Principal. Such a request that the Probate Court appoint a Guardian or Conservator is uncommon because almost always the DFPOA and POAHC grant the Agent sufficient authority to assist the Principal without having to resort to the Probate Court. If such a case goes before the Probate Court, it is because either the DFPOA or the POAHC are invalid or inappropriate for the circumstances, or because there has been a family dispute.
8. Under both the DFPOA and POAHC, the Agent is acting in a position of trust with certain responsibilities. When the Agent handles money and property for the Principal, the Agent must keep accurate records of how the funds are used and the properties managed. In most cases, it is sufficient to pay expenses by check and to keep copies of receipts and other financial documents. The Principal’s money and property must be used for the benefit of the Principal, and not the benefit of the Agent. The Agent must avoid financial transactions that place the Agent in a conflict of interest with the Principal. The Agent has the same fiduciary duty to the Principal that a trustee has to a beneficiary. The Agent must have sufficient records to be ready to report on the Principal’s finances and property to a successor Agent, a Conservator

that might be appointed by Probate Court, or to a Personal Representative who will be appointed to represent the Principal after the death of the Principal.

Guardianship and Conservatorship

- ➔ **Guardianship and Conservatorship are Probate Court Orders that occur when the Court determines that an “allegedly incapacitated person” should be treated as a “protected person.”**
- A **Guardianship** is established when the Probate Court appoints a Guardian over a person. The Court must determine that the protected person is unable to make or communicate responsible decisions concerning himself or herself. The Guardian has the responsibility and authority to supervise and control medical, health care and residential matters concerning the protected person.
- A **Conservatorship** is established when the Probate Court appoints a Conservator over a person. The Court must determine that the protected person is unable to make or communicate responsible decisions concerning his or her property or finances. The Conservator has the responsibility and authority to manage, supervise and control the real estate, financial, investment, personal property and income matters concerning the protected person.
- The Guardian and Conservator may be the same or different persons. The appointment of the Guardian and Conservator may be pursued as separate or combined actions in Probate Court.

Some Important Points About Guardianship and Conservatorship

If a resident with Alzheimer’s disease or another dementia condition is involved with the Probate Court in legal actions of Guardianship and Conservatorship, it will most likely be an aggravated situation, and quite possibly an emergency. If the resident and the family have taken a prior opportunity to plan for decision making authority in light of the resident’s declining decision making ability, most likely there will be a DFPOA and POAHC in place.

If petitioning the Probate Court becomes necessary, it is most likely because there are no Power of Attorney documents in place, or because the Power of Attorney documents that exist are not valid or are inadequate for the resident’s needs. For example, there may be a medical emergency where no one has authority to authorize necessary medical treatment. If a Power of Attorney exists it might be invalid or inappropriate for one of several reasons:

- ☒ The DFPOA was signed after September 1997 and lacks the Notice to Principal and Notice to Agent language required by Maine law.

☒ The DFPOA was not notarized. Maine law does not require that the DFPOA be signed by witnesses, but it is best to have it signed by 2 witnesses.

☒ The POAHC was not signed by 2 witnesses. Maine law does not require that the POAHC be notarized, but it is best to have it notarized.

The Probate Court may also intervene if the Power of Attorney document is not appropriate for the resident's circumstances. For example, the DFPOA may lack language permitting the Agent to make gifts when such a tactic would be appropriate for tax or Medicaid planning strategies. Or, the primary Agent may have become unable to assist the Principal and the document does not provide for any successor Agent, or the successor agent is not the appropriate person to assist the Principal. There might also be the situation where the primary Agent must sign a deed for the Principal and the original document DPOA cannot be located. The Registry of Deeds will accept only an original DPOA.

Even where the Principal has signed a valid, appropriate Power of Attorney, the Principal can continue to act on his or her own authority, ability and initiative after signing the DPOA. This may cause a situation where the Agent is attempting to assist the Principal, but the Principal takes inappropriate and possibly dangerous action on his or her own. While petitioning the Probate Court to appoint a Guardian or Conservator is usually avoided because of the time, expense and family tension it involves, sometimes seeking the appointment of a Guardian or Conservator is necessary.

The significant advantage of the Probate Court appointment of a Guardian or Conservator is that it is a court order that the protected person and the institutions dealing with that person must honor. The court order cannot be changed without returning to Probate Court and convincing the Court that there are good facts and law that support changing the court order. When the Principal resists care, many institutions will require that a Guardian and/or Conservator be appointed.

Finally, there may be a major dispute involving the protected person's care, residence or financial management. Such a dispute may involve family members, health care providers or creditors. These disputes may become so intense that the parties have to present their facts and arguments to the Probate Court and let the judge decide whom to appoint as the person's Guardian and Conservator that will act in the person's best interests.

How The Court Appoints Guardians And Conservators

While residents may not frequently be involved with a Guardian or Conservator, several points should be understood about the process. The Petitioner is an individual, usually represented by a lawyer, who petitions the Probate Court to appoint a Guardian or Conservator for an "Allegedly Incapacitated Person" (AIP). The Petitioner must establish that the AIP suffers from a physical or mental condition that prevents the AIP from making reasonable decisions about his or her person or property.

There may be an emergency hearing or a regularly scheduled Probate Court hearing after formal legal notice to all concerned. A physician or psychiatrist must sign a court statement that the protected person is unable to make reasonable decisions regarding self or property. The Probate Court will appoint a nurse or social worker as a “Visitor” to investigate and report on the protected person’s mental and physical condition, the care arrangements, and the suitability of the proposed Guardian and Conservator.

If a resident is an AIP, the Visitor will likely interview someone involved with the person’s housing in order to report to the Probate Court as to the AIP’s present and recommended future residential needs. A Guardianship and Conservatorship Plan must be submitted to the Probate Court outlining care arrangements for the protected person.

If the Guardianship/Conservatorship Petition is unopposed by the AIP or anyone else, then Guardian and / or Conservator is likely to be appointed by the Probate Court within one court hearing if it is a regular petition, or within two hearings if it is an emergency petition. If the Petition is contested by the AIP or by any other person or institution considered an interested party to the court action, it may become a complex, lengthy and expensive trial. If that develops, someone from the AIP’s housing may be called as a witness to describe the facts of the housing situation and how it supports or contradicts the need for the resident to have a Guardian or Conservator.

If there is a dispute as to who should be appointed Guardian or Conservator, Maine law gives priority to a person who is otherwise competent and able, and who has been nominated in writing by the AIP when the AIP was mentally competent. This sort of appointment is commonly included in a DFPOA or POAHC. If there is no one nominated in writing, then the order of priority is the AIP’s spouse, parent and then adult children.

➡ **It is important to understand the behavior and condition of your residents who might be developing Alzheimer’s disease or another dementia condition. You need to understand Power of Attorney, Guardianship and Conservatorship as legal devices that allow for decision making for such persons. However, it is most important to attempt informal assistance and problem resolution for such persons.**

Your Role In Guiding Decision-Making Arrangements

If you suspect that a resident is showing signs of Alzheimer’s or a related dementia, it is important to make sure that appropriate legal arrangements are planned. A meeting with the resident and family members is frequently the best place to begin. Addressing problems early may avoid costly and stressful legal disputes later. Frequently problems can be solved and strategies developed which respond to the resident’s changing mental abilities, memory and behavior. This is the time to urge the family to consult with an Elder Law attorney to secure a valid and appropriate DFPOA and POAHC. It may be possible to work with the family to arrange for the resident’s bills to be promptly paid and for mail to be forwarded to someone with the ability and authority to appropriately respond.

- As the resident's condition develops, review how long the current housing and services will meet the resident's care needs. Plan for an appropriate referral and transfer to an appropriate care setting, most likely an assisted living facility that focuses on dementia care.
- If the resident's situation deteriorates, and it is not possible to work with the resident and family members to make a transfer to an appropriate facility, it may be necessary to pursue eviction as a last resort. You should consult with housing management and a lawyer about policies and procedures to follow in such cases. For many types of government-subsidized housing it is necessary to establish good cause to evict the tenant. Try hard to avoid an eviction, but if there are no alternatives, follow the legal procedures that respect the rights of both the resident and housing management.
- One final note regarding some of the options for the spouse of the resident with Alzheimer's disease or another dementia condition. The spouse is usually the person with the largest burden in caring for such residents. The spouse thus needs as much support as possible from the family, service providers and housing. The needs of the spouse should be considered in developing a transfer strategy for the Alzheimer's/dementia resident. Frequently the spouse will remain in housing when the Alzheimer's/dementia resident transfers to an assisted living facility. Sometimes the spouse is also appropriate for transfer to assisted living. If the Alzheimer's/dementia resident is appropriate for Medicaid in either assisted living or nursing home care, it is possible to protect certain amounts of the family assets and income for the healthy spouse. It is appropriate to suggest that the healthy spouse be referred to an Elder Law attorney familiar with financing assisted living and nursing home care through Medicaid, as well as Medicare, family funds and long term care insurance.
- Elder law attorneys in your area are a good source of information and support for your residents who are involved with many of these issues. **You can locate an elder law attorney in your area through the Maine State Bar Association, 622-7523.** Invite the elder law attorney to your housing facility to present a short presentation for residents on Powers of Attorney and other issues pertinent to Alzheimer's/dementia residents and their families.

Understanding The Law To Avoid Negligence Liability

Many persons and institutions today fear that they will be unduly sued on a claim that they negligently injured someone. These fears also exist among housing providers. The best way to protect yourself from negligence law suits is to understand how the law imposes liability for negligence, and on whom and in what circumstances.

- ➡ **Negligence is the failure to prevent a foreseeable injury. To establish a successful claim of negligence, the plaintiff must prove 3 elements.**

1. **Breach of duty.** This is defined as a failure to observe the **standard of care** established for the conduct in question. The standard of care is what a reasonably prudent person would have done in the same or like circumstances. The standard of care may be established by a combination of expert witnesses, internal business policies and procedures, governmental rules and regulations, or what courts have decided the standard of care is in similar circumstances.
2. **Proximate cause.** The breach of duty must have been the **proximate cause** of the injury that was reasonably foreseeable. The proximate cause must be foreseeable. The breach of the standard of care must be the cause of the injuries. That is there must have been no intervening actions or circumstances that caused the injuries independent of the breach of the standard of care.
3. **Damages.** The injury must have caused **damages** for which the person can be monetarily compensated. The person must have suffered some physical, mental or property damage that is appropriate for the award of monetary compensation. **Compensatory damages** are awarded by the courts to compensate the injured person for expenses arising directly from the injury and recovery. **Punitive damages** are awarded because the person or company that caused the injury acted intentionally or with gross negligence.

Who Can Be Liable For Negligence?

Anyone who had anything to do with the situation can be held individually responsible if the 3 elements of negligence are established regarding his or her conduct.

- **Respondeat Superior.** The employer is held responsible for the actions of an employee, unless it can be clearly shown that the employee acted outside of the scope of his or her authority. Your liability may be lessened if you use an **Independent Contractor**, but you give up much ability to control an independent contractor.
- **Corporate Liability.** Corporate assets are at risk under respondeat superior or if the corporation fails to properly conduct its business or supervise and control its employees. Corporate liability is usually limited to corporate assets, but **corporate directors and officers** may be personally liable for their failure to properly control and direct the corporation. In Maine, **directors and officers of a nonprofit corporation** are immune from negligent actions, but not from intentional actions. However, such immunity does not protect against the costs of defending a law suit.
- **Apparent Agency.** When a business provides a product or service to the public, that business is liable to the public for its actions. However, if the public **reasonably** believes that another agency or business is providing the product or service, then the **second business** may be liable for any injuries caused by the product or service.

Take Steps To Protect Yourself

Be aware that your residents understand who is providing them with products and services. You do not want to be in the situation where you have no control of the product or services that your residents are receiving, but are liable for any injuries your residents may suffer because they reasonably believe that you are providing the products and services.

Keep clear and regular business records. Good business records can establish the facts concerning a disputed incident. Good business records can establish the standard of care in your favor. Non-existent or careless business records can show that your business is negligent. Inaccurate or thoughtless statements in your business records can be the strongest admissions against your interest.

Be clear with **BOTH** your service providers and with your residents as to who is providing what services, under whose control and under what conditions. You should set the terms by which both your service providers and your residents understand that the product and service are being delivered. Do not let others dictate the terms on which you deliver your products or services. Visualize how both service providers and residents perceive your operations. What is clear to you may be seen in a very opposite light by someone who is injured, or by a court several years from now.

Discuss your products and services with your insurance agent and understand your insurance coverage, including the costs of a legal defense.

Be clear with your residents, especially in the language that is used in your resident agreements and disclosures. **A waiver will not protect you from negligence liability if an injured resident brings a claim against you.** A waiver signed by your residents may show that they have been informed of the facts of the situation, or that they chose to act knowing certain facts. However, a waiver will not by itself be total protection against liability for negligence.

You assume a much smaller risk if you properly operate a consumer-driven, service-delivery model that emphasizes a resident's independent decision making ability. Your greatest liability is when you make decisions for the resident.

Negligence Claims Can Be Limited In Several Ways

Statute of Limitations. The law limits the length of time a plaintiff has to file a complaint in court against you following the injury. In Maine, the general statute of limitations for injuries is 6 years.

Assumption of Risk. If a person makes an informed choice to assume some risk of injury when choosing a service, that person's ability to recover for an injury may be limited under the law of comparative negligence.

Comparative Negligence. If the injured person contributed to the cause of the injury, a court will reduce the damage award according to the percentage that the injured person was responsible for the injury.

Conclusion

There is a great demand for the services residents want and need. Do not become frozen in your actions because of undue concerns for liability. While there is no way to entirely avoid the risk of being sued, there are many things you can do to vastly reduce that risk.

Understand the special circumstances and needs of persons with Alzheimer's disease and other dementia conditions. Work with such residents and their families to recognize their conditions and limitations. **Know how Power of Attorney, Guardianship and Conservatorship can help residents who have trouble with decision making.**

Make the continued stay of residents with Alzheimer's disease and in your housing as positive as possible for as long as possible. Help identify when they need to move into an assisted living facility, or another location that can provide a higher level of care. Discuss with the resident, spouse and family where appropriate care for the resident can be located. Encourage your residents and their family to utilize the services of the Alzheimer's Association.

Develop a good consumer-driven supportive services model of product and service delivery. Utilize a service coordinator. Establish **written** policies and procedures. Inform residents of all aspects of the program in writing.

Resources And Further Reading

1. Vogel & Associates, 550 Forest Avenue, P.O. Box 3649, Portland, Me 04014-3649, a law firm focusing on Elder Law. For more information, contact Timothy M. Vogel, Esq., at 207-761-7796 or send an e-mail to tvogel@maine-elderlaw.com
2. *Aging: Taking Care of Business*, published by the Maine State Department of Human Services, Bureau of Elder and Adult Services, January 2000. To order copies, call the Bureau toll-free at 800-262-2232, or visit their web site at www.state.me.us/dhs/beas